Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a presidential foreign-affairs action that is otherwise exempt from environmental-review requirements under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and Clean Air Act, 42 U.S.C. 7506(c)(1), became subject to those requirements because an executive agency promulgated administrative rules concerning implementation of the President's action.

PARTIES TO THE PROCEEDINGS

Petitioners are: United States Department of Transportation; Federal Motor Carrier Safety Administration (FMCSA); Annette M. Sandberg, as Administrator, FMCSA; and Joanne Haller, as Acting Western Field Administrator, FMCSA.

Respondents who were petitioners in the court of appeals below are: Public Citizen; Brotherhood of Teamsters, Auto and Truck Drivers, Local 70; California Labor Federation; California Trucking Association; Environmental Law Foundation; and International Brotherhood of Teamsters.

Respondents who were petitioners-intervenors in the court of appeals below are: Natural Resources Defense Council and Planning and Conservation League.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of Transportation (DOT), the Federal Motor Carrier Safety Administration (FMCSA), the Administrator of FMCSA, and the Acting Western Field Administrator of FMCSA, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-52a) is reported at 316 F.3d 1002. The interim final rules of FMCSA are published at 67 Fed. Reg. 12,702 (App., *infra*, 53a-124a), 67 Fed. Reg. 12,758 (App., *infra*, 125a-202a), and 67 Fed. Reg. 12,776 (App., *infra*, 203a-220a).

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2003. A petition for rehearing was denied on April 10, 2003 (App., *infra*, 221a-222a). On June 30, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 8, 2003. On July 28, 2003, Justice O'Connor further extended the time within which to file a petition for a writ of certiorari to and including September 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory provisions and regulations are set out in an appendix to this petition. App., *infra*, 223a-231a.

STATEMENT

In this case, the Ninth Circuit has required the federal agency that is responsible for motor-carrier safety to undertake an extensive review of the environmental effects of the President's decision to lift a trade moratorium. The court of appeals misapplied the Nation's environmental laws and constrained the President's discretion to conduct foreign affairs. The court of appeals' decision also prolongs a significant trade dispute between the United States and Mexico, which the President has sought to resolve in accordance with the requirements of the North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 605 (1993), and the decision of an international arbitration panel finding the United States to be in violation of its obligations under NAFTA.

1. The President exercises foreign-affairs powers as Commander-in-Chief of the armed forces (U.S. Const.

Art. II, § 2, Cl. 1), through his power to "receive Ambassadors and other public Ministers" (*id.* Art. II, § 3), and in the course of "tak[ing] Care that the Laws be faithfully executed" (*ibid.*). He is the Nation's "guiding organ in the conduct of our foreign affairs," in whom the Constitution vests "vast powers in relation to the outside world." *Ludecke* v. *Watkins*, 335 U.S. 160, 173 (1948); see *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988) (noting "the generally accepted view that foreign policy was the province and responsibility of the Executive") (citation omitted).

The Foreign Commerce Clause of the Constitution, Article I, Section 8, Clause 3, empowers Congress to "regulate Commerce with foreign Nations." This Court has recognized that "[t]he Constitution gives Congress broad, comprehensive" and "plenary" powers to regulate foreign commerce. *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125-126 (1973); accord *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 46 (1974) ("The plenary authority of Congress over * * * foreign commerce is not open to dispute").

NAFTA and ensuing trade reforms arise from a joint exercise of the President's foreign-affairs power and Congress's foreign-commerce power. In 1990, the United States, Mexico, and Canada initiated negotiations with the goal of eliminating or reducing trade barriers and creating a free-trade zone that encompasses the three countries. In December 1992, the leaders of the three nations signed NAFTA. Congress implemented NAFTA through, inter alia, the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (19 U.S.C. 3301 *et seq.*). See generally App., *infra*, 7a-8a. NAFTA took effect on January 1, 1994. See *Memorandum on Imple-*

mentation of NAFTA, 29 Weekly Comp. Pres. Docs. 2641 (Dec. 27, 1993); 19 U.S.C. 3311(b).

2. a. This case involves a trade-liberalization policy that the President has determined to implement in accordance with NAFTA and pursuant to express congressional authorization. Since 1982, the President has been empowered to determine whether certain Mexican and Canadian motor carriers may operate in the United States. See 49 U.S.C. 10922(*l*) (1982); 49 U.S.C. 13902(c). Congress has specifically authorized the President to lift or modify an existing trade moratorium adopted in 1982 that has prohibited grants of new operating authority to Mexican motor carriers. The moratorium arose from concerns that Mexico was not permitting United States motor carriers the same access to its markets as Mexican motor carriers have had to United States markets. It prevents Mexican carriers—other than carriers that already have authority to operate in the United States or are not required to obtain operating authority (such as carriers that operate solely in commercial zones along the United States-Mexico border)—from providing cross-border trucking services and scheduled bus service in the United States. See 49 U.S.C. 13902(c); see also App., *infra*, 9a-10a, 56a-57a (discussing history of moratorium).[1]

In NAFTA, the United States agreed to partially phase out the moratorium by, among other things, permitting Mexican carriers to obtain operating authority

[1] The moratorium originally applied to Canadian as well as Mexican motor carriers. In 1982, after the United States entered into a bilateral understanding with Canada, the President lifted the moratorium on new authorizations of Canadian carriers. See *Determination Under the Bus Regulatory Reform Act of 1982*, 47 Fed. Reg. 54,053 (1982); see also App., *infra*, 56a.

for cross-border truck services to or from border States starting in December 1995, and to or from any point in the United States starting in January 2000. Due to concerns about the adequacy of Mexico's regulation of motor-carrier safety, however, President Clinton did not lift the moratorium on cross-border truck services as scheduled. See C.A. Supp. E.R. 16, 19.

In February 2001, an international arbitration panel convened pursuant to NAFTA's dispute-resolution provisions upheld a trade complaint that Mexico had filed against the United States, determining that the moratorium on granting new cross-border operating authority violates NAFTA. App., *infra*, 10a, 59a. The panel recommended that the United States "take appropriate steps to bring its practices with respect to cross-border trucking services * * * into compliance with its obligations under the applicable provisions of NAFTA." C.A. Supp. E.R. 23. Almost immediately after the arbitrators' decision, the President made clear his intention to lift the moratorium on cross-border operations in order to comply with NAFTA and promote trade between the United States and Mexico.[2]

[2] See App., *infra*, 10a; see also, *e.g.*, *Remarks to the Hispano Chamber of Commerce in Albuquerque*, 37 Weekly Comp. Pres. Docs. 1174, 1176 (Aug. 15, 2001) ("[W]e ought to enforce all of NAFTA. I believe strongly we can have safety on our highways without discriminating against our neighbors to the south. * * * [I]f United States trucks and Canadian trucks are allowed to move freely on our highways, we can not only enforce the laws; it will help prosperity spread its roots throughout our neighborhood."); *Remarks Prior to a Meeting with Virginia Gubernatorial Candidate Mark Earley and an Exchange with Reporters*, 37 Weekly Comp. Pres. Docs. 1103, 1104 (July 26, 2001) ("[Mexican truckers] need to be treated just like the Canadians are treated. We ought to accept the spirit of NAFTA."); Steven Greenhouse, *Bush to*

b. The Federal Motor Carrier Safety Administration (FMCSA) is the agency within the Department of Transportation that is responsible for motor-carrier safety and registration. See 49 U.S.C. 113(f). FMCSA operates under a general statutory mandate to grant registration to all domestic or foreign motor carriers that are "willing and able to comply with" applicable safety and financial-responsibility requirements for receiving operating authority. 49 U.S.C. 13902(a)(1). FMCSA has no authority to base those registration decisions on environmental considerations or to promulgate or enforce environmental requirements for motor carriers.

In May 2001, following the decision of the NAFTA arbitration panel and the President's announcement of his intention to lift the moratorium, FMCSA published for comment proposed rules addressing the regulation of Mexican motor carriers seeking authority to conduct cross-border operations. One of the proposed rules (the Application Rule) involved the establishment of a new application form specifically for Mexican carriers that might seek cross-border operating authority, in order to require those carriers to submit more detailed safety-related information than was required on the form that the carriers previously would have used to apply for such authority. See *Application by Certain Mexican Motor Carriers to Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border*, 66 Fed. Reg. 22,371, 22,372 (2001). Another (the Safety Monitoring Rule) proposed a safety-inspection regime for most Mexican motor carriers, including (but not limited to) carriers that

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Open Country to Mexican Truckers, N.Y. Times, Feb. 7, 2001, at A12.

would receive operating authority under the Application Rule. See *Safety Monitoring System and Compliance Initiative for Mexican Motor Carriers Operating in the United States*, 66 Fed. Reg. 22,415 (2001).[3]

c. In December 2001, Congress enacted Section 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. 864, which addressed cross-border operations by Mexican trucks. Section 350 provided that no funds appropriated under the 2002 Appropriations Act could be "obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border" until, among other things, FMCSA implemented specific application and safety-monitoring requirements for Mexican carriers. Pub. L. No. 107-87, § 350(a), 115 Stat. 864. In February 2003, Congress extended the conditions of Section 350 to appropriations for Fiscal Year 2003. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 419.

d. Meanwhile, in January 2002, as part of its consideration of the Application and Safety Monitoring Rules (and related proposed rules that are not at issue in this case), FMCSA released an Environmental Assessment. C.A. E.R. 26-164. FMCSA assumed in its environmental analysis that the President would lift the moratorium on cross-border operations. See *id.* at 40-51. FMCSA explained (*id.* at 40-41) that the President had announced his intention to comply with the

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[3] A third rule proposed on the same day, which concerns application rules for Mexican motor carriers operating solely in border commercial zones, is not at issue in this case.

arbitration panel's decision by lifting the moratorium, and that FMCSA's proposed rules concerning cross-border operations would have no practical impact until the President lifted the moratorium. FMCSA concluded that changes in Mexican truck and bus traffic that are the result of lifting the moratorium, rather than FMCSA's safety program, should be attributed to the President's trade action rather than the safety rulemaking. *Id.* at 42.

Against that background, FMCSA compared the environmental impacts of its "Proposed Action" alternative, under which FMCSA would adopt the new rules and the President would lift the moratorium, with the "Baseline Scenario," under which FMCSA would not promulgate new safety rules and the moratorium would remain in place, and the "No Action" alternative, under which FMCSA would not promulgate the proposed new rules but the moratorium nevertheless would end (a scenario that, FMCSA recognized, would not occur as a practical matter in light of the spending restrictions of Section 350, see C.A. E.R. 40-41). See *id.* at 43-46. FMCSA assessed the potential effects of the alternatives on traffic and congestion (*id.* at 76-83), public safety and health (*id.* at 83-89), air quality (*id.* at 89-99), noise (*id.* at 99-106), and socioeconomic factors (*id.* at 106-113). Based on its review, FMCSA concluded that "because the Proposed Action by FMCSA is mostly administrative"—involving procedures for obtaining operating authority—"impacts associated with this Action are expected to be minor." *Id.* at 114. In particular, FMCSA determined that the foreseeable environmental impacts associated with inspectors' conduct of roadside safety inspections of Mexican trucks and buses were not significant, and that if those impacts became significant in the future, they could be

mitigated without modifying the proposed safety rules. *Id.* at 114-115. Accordingly, FMCSA determined that the Application Rule and the Safety Monitoring Rule would have no significant impact on the human environment and that a full environmental impact statement (EIS) therefore was not required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* C.A. E.R. 25.

e. On March 19, 2002, FMCSA issued its Application Rule (App., *infra*, 53a-124a) and Safety Monitoring Rule (*id.* at 125a- 202a). In preambles to the new rules, FMCSA explained that its Environmental Assessment satisfied concerns, which had been expressed by some members of the public in their comments on the proposed rules, that FMCSA was required to review the rules under NEPA. See App., *infra*, 64a-65a, 154a-155a.

FMCSA additionally rejected the argument of the Attorney General of California that FMCSA was required to perform a so-called "conformity review" of the proposed rules under the Clean Air Act (CAA), 42 U.S.C. 7506(c)(1). The CAA provides that a federal agency shall not "engage in, support in any way or provide financial assistance for, license or permit, or approve" any activity that does not "conform" to the requirements of a state air-quality implementation plan that has been established under the CAA. 42 U.S.C. 7506(c)(1). FMCSA stated that its rules did not have to be assessed in greater detail for compliance with the conformity requirement because they (1) involve only "improv[ing] FMCSA's regulatory oversight, not an action to modify the moratorium and allow Mexican trucks to operate beyond the border" (App., *infra*, 66a), and (2) are exempt from the conformity-review requirement under an Environmental Protection Agency

(EPA) regulation that establishes threshold emission amounts for various pollutants, below which no conformity review is required. *Id.* at 65a-66a, 155a; see 40 C.F.R. 93.153(b).[4]

Specifically addressing the relationship between its rules and the moratorium on granting operating authority for cross-border operations by Mexican carriers, FMCSA explained that its rules would not "'open the border' or lift the current moratorium." App., *infra*, at 79a. The agency noted that "[t]he President, not the FMCSA, has that authority." *Ibid.* FMCSA further observed that "[t]he President has announced that the United States will comply with its NAFTA obligations regarding Mexico-domiciled motor carrier access in a manner that will not weaken motor carrier safety. The regulations help ensure motor carrier safety in anticipation of presidential action lifting the moratorium." *Ibid.*

On the same day that FMCSA published the Application Rule and Safety Monitoring Rule, it also promulgated a rule that was required by the Motor Carrier Safety Improvement Act of 1999, 49 U.S.C. 31148, to establish training and certification requirements for all persons who conduct federal motor-vehicle safety inspections and safety audits of domestic and foreign motor carriers. See App. *infra*, 203a-220a (Auditor Certification Rule); see also *id.* at 205a-206a (discussing statutory background). Although that rule was not limited to Mexican carriers, Congress in the 2002

[4] FMCSA also relied on EPA's de minimis exemption for rulemakings, 40 C.F.R. 93.153(c)(2)(iii). See App., *infra*, 65a-66a. The court of appeals found that provision of EPA's regulations inapplicable to FMCSA's Application and Safety Monitoring Rules, see *id.* at 48a-51a, and this petition does not seek review of the court of appeals' determination on that point.

appropriations rider had made promulgation of that industry-wide rule a prerequisite to expending funds on processing Mexican carriers' applications for cross-border operating authority. See Pub. L. No. 107-87, § 350(a)(10)(B), 115 Stat. 866.

f. In November 2002, the President modified the trade moratorium to allow FMCSA to register Mexican carriers for cross-border operations. App., *infra*, 232a-234a. The President determined that permitting cross-border operations is "consistent with obligations of the United States under NAFTA and with our national transportation policy," and that "expeditious action is required to implement th[e] modification to the moratorium." *Id.* at 233a.

3. Respondents filed petitions for review of the Application, Safety Monitoring, and Auditor Certification Rules, asserting that the rules were promulgated in violation of NEPA, the conformity requirement of the CAA, and the Administrative Procedure Act, 5 U.S.C. 701-706. See App., *infra*, 13a. The Ninth Circuit granted the petitions for review.

a. The court of appeals first determined (App., *infra*, 14a-26a) that respondent Public Citizen—which alleges that some of its members who live near the Mexican border would suffer adverse health consequences from increased emissions attributable to cross-border operations by Mexican commercial vehicles, see *id.* at 16a-17a—has standing to challenge FMCSA's safety rules.

The court did not suggest that FMCSA's rulemakings themselves determined whether the border would be opened to Mexican carriers. To the contrary, the court recognized that, by the time FMCSA issued its safety rules, "the President * * * had already indicated his intention to comply with NAFTA by lifting the trucking moratorium" (App., *infra*, 19a) and "com-

mitted himself to a course of action to which the United States was obligated under an important international treaty * * * as to which it was then in default" (*id.* at 21a-22a). Nevertheless, the court concluded that respondents sufficiently alleged both causation and redressability. The court reasoned that Mexican trucks would be able to conduct cross-border operations if FMCSA's safety regulations were upheld, but, if the petition for review were granted, then Mexican trucks would be temporarily excluded by virtue of Section 350, pending FMCSA's completion of a new environmental analysis. See *id.* at 22a-23a.

b. Turning to the merits, the court of appeals concluded that FMCSA's Environmental Assessment was deficient under NEPA because the agency failed to consider the overall environmental impact of lifting the moratorium on Mexican trucks and buses, and instead confined its analysis to the narrower effects of FMCSA's safety regulations themselves. App., *infra*, 28a-43a. Quoting regulations promulgated by the Council on Environmental Quality (CEQ) to guide federal agencies' implementation of NEPA, the court determined that FMCSA was required to consider the effects of lifting the trade moratorium because "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the [Environmental Assessment] was prepared." *Id.* at 31a (quoting 40 C.F.R. 1508.7 and 1508.8(b)). The court further concluded that, in studying the effects of the border opening, FMCSA should assess those effects on a long-term basis by determining the most likely routes of Mexican traffic, and then conducting localized environmental analysis for particular geographic areas. See *id.* at 33a-39a. The court also faulted FMCSA for failing to consider additional alternatives to its proposed safety rules,

"such as, for example, proposing more stringent controls on incoming Mexican trucks." *Id.* at 42a. Finally, the court disagreed (*id.* at 43a-45a) with FMCSA's view that the Auditor Certification Rule comes within a categorical exclusion from any requirement of further NEPA analysis.[5]

c. The court of appeals further determined that DOT erred in failing to undertake a region-by-region conformity review of the border opening under the Clean Air Act. App., *infra*, 46a-51a. The court reasoned that although FMCSA had determined that its regulations would not lead to any significant increase in motor-vehicle emissions, that determination was based on what the court regarded as an "illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry." *Id.* at 47a.

The court remanded the case to DOT for the preparation of "a full Environmental Impact Statement" under NEPA and a conformity determination under the CAA, with respect to all three regulations. App., *infra*, 52a.

REASONS FOR GRANTING THE PETITION

The President of the United States must be able to act quickly and with assurance to implement the decisions that are entrusted personally to him. That is particularly true when, as here, the President's responsibilities involve relations with other nations. In

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[5] The court of appeals determined (Pet. App. 43a-45a) that the Auditor Certification Rule is not categorically excluded from NEPA review under implementing regulations of the CEQ and DOT. This petition does not seek review of that holding. DOT is preparing an environmental assessment to address the environmental consequences of the Auditor Certification Rule and to determine whether a full EIS should be prepared.

this case, the Ninth Circuit has construed the environmental laws as contravening that constitutionally grounded necessity. The Ninth Circuit's approach is unsupported by the relevant statutes and inconsistent with agency regulations. If not overturned, the court of appeals' decision will delay substantially the United States' compliance with the North American Free Trade Agreement and the arbitration panel's decision of February 2001. That delay is causing the Government of Mexico to continue its parallel restrictions on operations by United States motor carriers and to threaten new trade sanctions. For all of those reasons, this Court's review is warranted.[6]

1. The court of appeals erred fundamentally in concluding that the National Environmental Policy Act and the Clean Air Act render "illusory" (App., *infra*, 47a) the critical distinction, under our Constitution and laws, between an action the President takes pursuant to his foreign-affairs powers and statutory authority vested in him, and a subordinate federal agency's domestic regulatory action. The court of appeals' decision takes away presidential discretion that NEPA and the CAA preserve.

a. Under NEPA, federal agencies must complete a detailed environmental impact statement before taking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Regulations of the Council of Environmental Quality—which implement the statutory requirement and "are

[6] Although the government argued in the court of appeals that respondents lack standing to challenge the FMCSA's safety rules under the environmental laws, the court of appeals determined that one respondent (Public Citizen) has standing. See pp. 11-12, *supra*. We do not contest the court of appeals' standing determination in this petition.

entitled to substantial deference," *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989)—provide that the "federal agencies" subject to NEPA do not include "the Congress, the Judiciary, or the President." 40 C.F.R. 1508.12. Therefore, the President's determination to implement NAFTA by lifting the moratorium on cross-border operations by Mexican motor carriers is not subject to NEPA's EIS requirement.

The court of appeals did not dispute that. See App., *infra*, 51a ("[W]e draw no conclusions about the actions of the President of the United States."). Instead, the court reasoned that CEQ regulations required FMCSA to prepare an EIS to study the environmental consequences of opening the border, because the President's lifting of the moratorium was a "reasonably foreseeable" consequence of FMCSA's rulemakings. *Id.* at 31a. Thus, in the court's view, an agency having relevant responsibility only for truck and bus safety—and lacking any regulatory responsibility for either international trade or motor vehicle emissions—had to conduct a full NEPA review of the President's foreign-policy decision to open the border, even though the President did not have to undertake such a study of his own action.[7]

In reaching that incongruous and incorrect conclusion, the Ninth Circuit relied particularly on two provisions of the CEQ regulations. The first states that the environmental "effects" that must be studied by federal agencies, see 42 U.S.C. 4332(2)(C)(ii), include

[7] To comply with the court of appeals' decision if it is upheld, FMCSA has entered into a $1.8 million contract with a vendor for the preparation of the EIS and CAA analysis mandated by the court of appeals' decision.

not only direct effects, but also "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. 1508.8(b); see 40 C.F.R. 1502.16(b). Under that regulation, indirect effects that trigger the EIS requirement must be "caused by the [agency] action." In this case, the effects of the President's opening of the border were not "caused by" FMCSA under the CEQ regulations. As the court of appeals explained, the President already had determined to open the border, see App., *infra*, 20a, and his determination that doing so would be in the best interests of the United States is what "prompted" FMCSA to issue its safety regulations, *id.* at 34a.

The court of appeals' application of CEQ's "indirect effects" rule therefore is flawed in two respects. First, it illogically requires an agency that participates in implementing a policy of the President to treat its own subordinate action as the "cause" of the action that the President earlier had determined to take, and over which the agency had no authority. Second, it subjects to full NEPA review a decision of the President that is not subject to NEPA. NEPA's purpose is "help[ing] public officials make decisions." 40 C.F.R. 1500.1(c); accord *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (discussing EIS requirement). That purpose is not served when a federal agency is required to prepare an EIS concerning a foreign-affairs decision that is exempt from NEPA and outside the agency's control, and, in addition, already has been made.

The courts of appeals have held that agencies are not required to conduct NEPA reviews of "ministerial" decisions over which they have no control. See *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.*, 267

F.3d 1144, 1151 (D.C. Cir. 2001) ("If * * * the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA provides can have no effect on the agency's actions, and therefore NEPA is inapplicable."); *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (collecting cases). Analogously here, when FMCSA conducted an environmental evaluation of its own safety rules it was not required to prepare a full-blown EIS to address the effects of the President's action, over which it had no control.

The court of appeals also relied on a CEQ regulation that provides that agency EISs should address "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. 1508.25(a)(2). A "cumulative impact" is an impact that "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" of any person. 40 C.F.R. 1508.7. FMCSA determined that the requirement of considering cumulative effects would be satisfied by comparing the Baseline Scenario (under which the moratorium would remain in place) to both the No Action alternative (opening the border without new FMCSA rules—which the appropriations riders forbade as a practical matter) and the Proposed Action alternative (opening the border with the proposed rules). See pp. 8-9, *supra*. The flaw that respondents asserted and the court of appeals found in FMCSA's analysis is that the agency did not adequately investigate the environmental effects of the President's border-opening decision itself. That is not an issue of the cumulative effects of *FMCSA's* actions. As explained, moreover, the border opening is a presidential action exempt from EIS requirements.

FMCSA's

~~That~~ conclusion is supported by the rule of reason that is inherent in NEPA and CEQ's implementing regulations. The CEQ regulations that apply when an EIS *is* required, for example, require only a "brief discussion" of issues that are not significant (to show why more study is not needed), see 40 C.F.R. 1502.2(b), and make clear that the agency is not required to obtain new information bearing on significant environmental impacts if the cost of doing so would be "exorbitant," 40 C.F.R. 1502.22. Similar principles apply in this case. FMCSA estimates that preparing an EIS addressing the President's decision to lift the trade moratorium would have cost well over one million dollars. FMCSA, however, has no responsibility for the foreign-affairs decision to which that costly effort would have related. Those facts confirm as a commonsense matter that it was not arbitrary and capricious for FMCSA to decline to undertake the massive environmental review contemplated by the court of appeals. See generally *Anderson* v. *Evans*, 314 F.3d 1006, 1015 (9th Cir. 2002) (noting that "arbitrary and capricious" standard applies to agency decision against preparing EIS); *Sierra Club* v. *DOT*, 753 F.2d 120, 126-127 (D.C. Cir. 1985) (same); cf. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 772, 776 (1983) ("The scope of the agency's inquiries must remain manageable if NEPA's goal of insuring a fully informed and well-considered decision is to be accomplished.") (internal quotations marks, brackets, and citations omitted).[8]

[8] Relatedly, and given the serious foreign-relations concerns presented in this case, see pp. 25-26, *infra*, the court of appeals erred in overturning FMCSA's safety rules and postponing implementation of the President's decision to open the border pending the agency's completion of a full-blown EIS. Even if the court of appeals' faulty NEPA analysis were accepted, the agency still should have been allowed to determine on remand whether the preparation of a full EIS—with the consequent delay—is required. See, *e.g.*, *Wisconsin* v. *Weinberger*, 745 F.2d 412, 426 (7th Cir. 1984) (court that finds NEPA violation "should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction.") (quoting *Environmental Def. Fund* v. *Marsh*, 651 F.2d 983, 1006 (5th Cir. 1981)).

b. The above analysis is not changed by the fact that Section 350 required—as a condition precedent to the border opening—promulgation of special FMCSA rules to ensure the safety of those Mexican trucks that would enter the United States following the President's lifting of the moratorium. As the court of appeals itself recognized, the linkage of FMCSA's rules to the President's trade action existed before Congress enacted Section 350. See App., *infra*, 21a-22a, 34a. Furthermore, although Section 350 involved Congress in the border-opening decision, action of Congress is exempt from NEPA under the same provision that exempts unilateral action of the President. See 40 C.F.R. 1508.12. It makes no difference under CEQ's regulations whether the President alone is responsible for lifting the moratorium, or the President and Congress jointly made that decision and specified the conditions under which it would occur. In either event, the decision concerning the Nation's foreign policy and foreign commerce was not made by FMCSA and the lifting of the moratorium is not attributable to FMCSA's safety rules.

The spending restrictions of Section 350 did establish the promulgation of FMCSA's safety rules as a condition precedent to processing Mexican carriers' applications for operating authority under the regulatory statutes administered by FMCSA. That function of processing applications is separate from the President's

decision to lift the moratorium and open the border to Mexican trucks. It therefore is inaccurate to portray FMCSA's actions as the cause of the entry of additional Mexican trucks and any consequent environmental effects. In any event, a mere "but for" relationship is not sufficient to establish the requisite causal link between a proposed agency action and possible environmental effects under NEPA, when there is a supervening action such as the President's foreign- affairs action in this case. See *Metropolitan Edison*, 460 U.S. at 773-774 (stating that NEPA's "effects" standard is not necessarily satisfied by "but for" causation, and drawing analogy to tort liability); cf. 2 *Restatement (Second) of Torts* §§ 440, 442 (1965) (discussing "superseding causes" of tortious injury).[9]

c. The court of appeals stated that FMCSA's Environmental Assessment was deficient not only for failing to consider "the effects of the presidential rescission of the moratorium on Mexican truck entry," but also because of other "methodological flaws." App., *infra*, 47a. It is not clear that the court believed that those "methodological flaws" have significance apart from FMCSA's determination not to conduct a full study of

[9] Likewise, the court of appeals' decision is not bolstered by Congress's statutory clarification that NAFTA implementation is subject to the Nation's environmental laws. 19 U.S.C. 3312(a); see App., *infra*, 7a-8a. The issue in this case is whether the environmental laws require the preparation of an EIS concerning the President's foreign-affairs action, not whether those laws apply to NAFTA implementation. Furthermore, Mexican motor carriers that obtain authorization to operate in this country are "subject to the same Federal and State laws, regulations, and procedures that apply to carriers domiciled in the United States" when they provide cross-border service, "including those administered by * * * Federal and State environmental agencies." App., *infra*, 233a-234a.

the environmental effects of the President's decision. See *id.* at 33a-43a. The court's conclusions concerning FMCSA's methodology all seem to flow from its erroneous determination about the necessity of preparing an EIS that addresses the President's actions. Furthermore, every argument that respondents presented to the court of appeals concerning supposed defects in FMCSA's Environmental Assessment depended on their theory that "[t]he challenged rules will have the practical effect—that is, the trucks crossing the border —that will create adverse environmental effects." C.A. Br. of Public Citizen, et al. 32; see *id.* at 27-44; see also C.A. Br. of Natural Resources Defense Council, et al. 17 ("The [Environmental Assessment] fails to take into account the public health effects that will result from an increase in the number of more polluting Mexican-domiciled trucks traveling in the U.S. once the Final Rules are implemented."). Because respondents raised only the border-opening issue in the court of appeals, the petition for review must be denied, and FMCSA's rules sustained, if this Court grants the instant petition for a writ of certiorari and determines that FMCSA was not required to prepare an EIS addressing the environmental effects of the President's decision to lift the moratorium.[10]

[10] The respondents who were petitioners below added a new argument in their Ninth Circuit reply brief. See C.A. Reply Br. of Public Citizen, et al. 21 ("FMCSA has the power to influence the number and type of Mexico-domiciled trucks that travel beyond the border zones by determining which trucks are certified."). But only the arguments made in their opening brief were possible grounds for granting relief. See *Eberle* v. *City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). Moreover, none of the respondents argued in FMCSA's rulemaking proceedings that the agency should adopt particular safety rules because of their environmental

Even if respondents had preserved the argument that FMCSA failed to study adequately the environmental effects of the proposed safety rules *themselves* —and even if that argument had merit—this Court's review of the question presented in the instant petition would be warranted. As explained below, that question has general importance beyond this case. See pp. 24-25, *infra*. Furthermore, the scope of an ensuing agency remand proceeding in this case, and the consequential delay in opening the border to Mexican motor carriers, would be far less if the agency were not required to conduct an entirely new and potentially broad-reaching environmental study of *the President's* decision to open the border to Mexican motor carriers.

2. The court of appeals' application of the CAA is similarly flawed. Under the CAA and implementing regulations promulgated by the Environmental Protection Agency, a federal "department, agency, or instrumentality" generally may not "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity" that violates an applicable State air-quality implementation plan. 42 U.S.C. 7506(c)(1); 40 C.F.R. 93.150. Presidential actions are not subject to the CAA's conformity requirement because the President is not a federal "department, agency, or instrumentality." See *Franklin* v. *Massachusetts*, 505 U.S. 788, 799-800 (1992); see also 40 C.F.R. 93.152 (using "federal agency" and "Federal department, agency, or instrumentality" interchangeably); *Determining Conformity of General Federal Actions to*

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effects or, more generally, that FMCSA should adopt more stringent rather than less stringent rules in an effort to benefit the environment by marginally reducing the number of Mexican trucks that might enter the United States.

State or Federal Implementation Plans, 58 Fed. Reg. 13,838 (1993) (defining federal "instrumentality" to mean "those Federal entities which are not specifically linked to a 'department' or 'agency,' including, for example, an independent Federal Commission."). Accordingly, the CAA portion of this case, similarly to the NEPA portion, can be resolved—in harmony with the constitutional separation of powers as well as the canon that specific statutory provisions govern general ones—by giving effect to the exclusion of the President from the coverage of the conformity provision.

The correctness of that result is confirmed by EPA's regulation defining "indirect emissions," which the court of appeals itself quoted. See App., *infra*, 49a (quoting 40 C.F.R. 93.152). As the court suggested (*id.* at 48a-49a), federal agencies must consider both the direct emissions that result from their actions (*i.e.*, emissions "caused or initiated by" the action that "occur at the same time and place as the action," 40 C.F.R. 93.152) and the indirect emissions. See generally 40 C.F.R. 93.153(c). "Indirect emissions" are less-proximate air emissions "that would be brought about by agency action, and that the agency can practicably control, and that are subject to a continuing program responsibility of th[e] agency." *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,221 (1993); see 40 C.F.R. 93.152 (defining "indirect emissions").

EPA's indirect-emissions definition ensures that agencies are not required to conduct conformity reviews of "subsequent activity that," although related to an agency action in some way, "is outside the control or responsibility of the federal agency." See *Environmental Def. Fund, Inc.* v. *EPA*, 82 F.3d 451, 464 (per curiam) (upholding regulation), amended, 92 F.3d 1209

(D.C. Cir. 1996). Here, FMCSA has no responsibility or control over the President's decision to lift the moratorium and open the border to Mexican motor carriers, no ongoing ability to control the emissions of Mexican motor carriers engaged in cross-border operations, and no programmatic responsibility for those emissions. The court of appeals did not find otherwise. Accordingly, the emissions that the court of appeals required FMCSA to study under the CAA are neither "direct" (proximate) emissions nor "indirect" emissions resulting from FMCSA's safety rules, and the conformity requirement does not apply to those emissions.

3. a. The Ninth Circuit's misapplication of NEPA and the CAA endangers the President's ability to act quickly and decisively in areas such as foreign affairs and national defense. This Court has long recognized the necessity of preserving presidential discretion in those matters and the inappropriateness of judicial interference with that discretion. See, *e.g.*, *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948). Particularly in the area of international diplomacy, the President must be able to "speak for the Nation with one voice," and to make commitments on behalf of the Nation in the exercise of his judgment and discretion, without fear that those commitments will be overridden by the courts. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381, 382 (2000); see *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1984) ("Great nations, like great men, should keep their word.") (brackets omitted). In particular, the fulfillment of the President's lawful commitments should not be delayed or prevented because subordinate executive officials have not undertaken environmental reviews of the President's action or other matters lying outside their authority, or because a court questions whether the

President's action is consistent with conclusions an agency reached in an EIS. The Ninth Circuit's decision also threatens to interfere with the internal operations of the Executive Branch, inasmuch as the President may be deterred from involving executive agencies in the implementation of his policies if doing so might effectively subject the President's own decisions to environmental-review requirements.

No other court of appeals has similarly applied NEPA or the CAA to actions of the President. The uncertainty created by the instant decision is intolerable, particularly when the opponents of agency action, if they coordinate their judicial attack, often are able to choose the judicial circuit that will hear their claims of agency error. See generally 5 U.S.C. 703; 28 U.S.C. 2343.

b. The circumstances of this case vividly illustrate the flaws and practical consequences of the court of appeals' approach. In February 2001, the President announced his determination to comply with the arbitration panel's interpretation of NAFTA by exercising his statutory authority to lift the moratorium on cross-border operations by Mexican trucks and buses. Congress then imposed preconditions for taking that particular action. In November 2002, the congressional conditions were satisfied and the President—acting with the special force of his own inherent authority *plus* express congressional authorization, see *Crosby*, 530 U.S. at 375—lifted the moratorium.

The Ninth Circuit's decision prevents the President's action from taking effect and thereby hampers commerce. On a border where there are approximately 4.5 million northbound truck crossings each year, see C.A. E.R. 55, cargo from Mexico must be transferred at the border onto U.S. trucks before it can be shipped to

points in the United States beyond the border zone. Passengers using scheduled bus services must follow similarly inefficient procedures.

The court of appeals' decision also prolongs a trade dispute between the United States and Mexico. The Government of Mexico asserts that its country has suffered economic damages in the billions of dollars from the moratorium on cross-border operations. See Ricardo Alonso-Zaldivar, *NAFTA Panel Rejects Constraints on Mexico Trucks*, L.A. Times, Feb. 7, 2001, at A1 (claimed losses of $2 billion as of arbitration decision). Mexico has cited the United States' failure to implement the arbitration decision to justify its own restrictions on the operations of United States motor carriers in Mexico, which deprive those carriers of opportunities in the Mexican market. See Tim Weiner, *Mexico Vows to Retaliate Against U.S. on Trucking*, N.Y. Times, Aug. 3, 2001, at A5. The Mexican Government also has indicated that it may implement retaliatory trade restrictions against the United States in proportion to its claimed losses. See John Nagel, *Transportation: Mexico Seeks Urgent Meeting to Discuss Implementation of Cross-Border Trucking*, 20 Int'l Trade Rep. (BNA) 521 (2003). The Ninth Circuit's decision therefore is causing serious and ongoing harm to United States' businesses and consumers and to international relations with Mexico.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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